

CHAPTER ONE – OFFICE OF THE CHILD ADVOCATE

Overview and History

The Office of the Child Advocate (“OCA” or the “Office”) was statutorily created on June 30, 1999. The Office has many statutory duties. Those include:

1. Staffing the Child Protection Accountability Commission;
2. Serving on various committees, commissions, task forces and workgroups representing the rights of children;
3. Advocating for changes in policies, procedures and statutes;
4. Organizing and participating in multi-disciplinary trainings; and
5. Designing and implementing a legal representation program for abused, neglected and dependent children.

OCA Attorneys and Volunteers

OCA has five full-time attorneys including the Child Advocate as well as a part-time Pro Bono Coordinator. In addition, OCA has a full-time Office Manager and Program Administrator as well as four part-time Family Crisis Therapists (social workers) and countless volunteer interns and law clerks.

OCA also has a volunteer attorney pool of more than 400 lawyers. Please review the OCA Annual Report and the Pro Bono Honor Roll to see the diverse pool of attorney volunteers. Out of the volunteer pool, approximately 50 are family law practitioners. The attorneys are partners and associates alike, and practice in all fields, including corporate litigation, patents, intellectual property, real estate,

in-house corporate counsel, criminal, medical malpractice and personal injury. Several retired and inactive attorneys also volunteer, some of which are stay-at-home parents.

Procedures for Referrals and Appointments

How does OCA find out about children who need an advocate?

There are two primary avenues which lead to the appointment of an attorney guardian *ad litem* for a child. The first avenue is referrals. OCA regularly receives referrals from biological parents, foster parents, relatives, schools, counselors and psychologists, medical professionals, law enforcement, the Department of Justice, the Children’s Department and the Court system. These referrals typically indicate that no one is looking out for an abused, neglected or dependent child’s best interests, and that the child or children would benefit from their own independent legal representation of his or her best interests. If a person calls to report child abuse or neglect, they are directed to the Child Abuse Hotline at 1-800-292-9582. **OCA does NOT investigate child abuse and neglect – the Division of Family Services does.**

The second avenue is a Court order. In compliance with 13 Del. C. § 701(c), the Court is required to appoint a guardian *ad litem* (“GAL”) through OCA or CASA for each child who enters the custody of the Division of Family Services. Routinely, the Court faxes an order as soon as a child enters care, requiring OCA and/or CASA to appoint a GAL for the child. The Court uses the following phrases in its orders requiring appointment of an attorney GAL through OCA:

1. An attorney guardian *ad litem* shall be appointed to represent [the child].
2. An attorney guardian *ad litem* or a CASA shall be appointed to represent [the child].
3. The Court requests that an attorney guardian *ad litem* from OCA be appointed to represent [the child].
4. A CASA or attorney guardian *ad litem* shall be appointed to represent the best interests of [the child].

How does OCA decide whether or not to represent a child? What records are considered and how long does it take?

When OCA receives a **referral** on a child (as opposed to a Court order requiring appointment), OCA will review records from the Delaware Children's Department. If any history with the Department exists, when OCA asks to review record, the Children's Department will respond within ten working days pending approval by their attorney. Upon notification from the Children's Department, OCA schedules the review within ten working days. During this four to six week process, OCA may also review the Family Court record. After all compiled records are reviewed, the Program Administrator evaluates the risk factors in the case. These risk factors include but are not limited to the following: history of abuse/neglect/dependency, domestic violence in the home, drug/alcohol addictions, and mental health history. The Child Advocate then makes the final decision, based upon a recommendation, as to whether or not an attorney will be appointed for the child. The Children's Department worker(s) and the referent are alerted as to the outcome of the OCA review. **All referral sources and OCA records are confidential pursuant to 29 Del. C. § 9006A.**

When OCA is **Court ordered** to represent a child, OCA does not review the Delaware Children's Department records prior to appointing an attorney. Instead, it requests that the records be immediately prepared by the different divisions for copying. OCA will then go to the physical Division location and retrieve the file. The copy of the file is then forwarded to the attorney for the child. In cases with long histories and/or which raise policy concerns, OCA will also retain a copy of the DFS record for internal use. If there are available attorneys through OCA, a Court-ordered appointment may only take a week or two. If there are no available attorneys, the child is placed on a waiting list until an attorney can be recruited.

How does an order of appointment occur?

For OCA referrals in which the child is in the custody of the Division of Family Services or in Departmental custody, or for Court ordered cases, OCA simply files a form of order with the Court indicating the attorney who will be representing the child's best interests. Prior to this order being filed, the OCA Pro Bono Coordinator contacts available attorney volunteers listed in the OCA database. If the attorney is able to handle the case a conflicts check is done prior to preparation of the form of Order

For OCA referrals where the child or children are not in the custody of the Division of Family Services/Children's Department, OCA, as a courtesy to the parties, files a motion with the Court requesting appointment of the attorney GAL. OCA is not required to do so. 29 Del. C. § 9007A(a)(2) states that if OCA "determines that a child needs guardian ad litem representation, the Court shall sign an order appointing." The Family Court

has also interpreted this provision in the same light. *See Bennett vs. Bennett*, File No. CS91-4334, Henriksen, J. (Jan. 2, 2002).

What happens once the order of appointment is signed?

Once the Court signs the form of Order appointing the attorney GAL, OCA will provide the attorney with a copy of any Children's Department files and information on the location of the child or children. If the child is in the custody of the Division of Family Services, the DFS worker's name and contact information is also provided to the attorney. OCA will then provide supportive services as necessary.

If you have been asked to take a case and there is a hearing scheduled, please attend the hearing regardless of whether or not you have received a signed order of appointment. The Court will often sign the order of appointment at that hearing, and provide you a copy at that time.

If more than a week passes without receiving a signed order, please contact OCA so that OCA can follow up with the Court.

What if the child does not get an attorney?

For non-DFS cases, OCA often will close a case if risk factors are very low, if there is no pending petition in Court, or if the child already has a CASA. If there are child protection system concerns, OCA will track these issues and has often brought safety issues/concerns to the Delaware Children's Department. For children in DFS custody, no file is ever closed while the child is in DFS custody. Instead,

efforts are continually made by OCA to locate an attorney for the child.

Please see our website at <http://courts.delaware.gov/childadvocate> for more information.

CHAPTER TWO - THE COMPONENTS OF DELAWARE'S CHILD WELFARE SYSTEM

A. DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH, & THEIR FAMILIES (DSCYF)

The Department of Services for Children, Youth and their Families ("DSCYF"), also known as the Children's Department, was created in 1980, and is enabled statutorily by 29 Del. C., Ch. 90. The Department is within the executive branch of government, and is primarily comprised of three divisions: The Division of Family Services, the Division of Youth Rehabilitative Services, and the Division of Child Mental Health Services.

Division of Family Services

The Division of Family Services ("DFS") is the lead agency charged with caring for Delaware's abused, neglected and dependent children. Currently, approximately 450 persons are employed by DFS, and as of April 30, 2007, were responsible for 5,921 children. Of those children, approximately 1,150 were in DFS legal custody. The remaining 4,774 children were receiving services from DFS while still in their home (intact families). The legal process, including the legal representation of children, involves the 1,150 children in DFS legal custody.

The DFS head office is located at 1825 Faulkland Road in Wilmington. Branches are spread throughout the state. The DFS Director is Carlyse

Giddins. New Castle County has sites at the New Castle County Police Station on Route 13 (hotline), the Elwyn Institute in Wilmington, and at University Plaza in Newark. Kent County has its offices in the Silver Lake Professional Plaza in Dover. Sussex County has locations in Georgetown, Milford, Seaford, and Frankford. Phone lists for each site are included in this manual at Tab 1.

Each county has several units that include but are not limited to investigation, treatment, permanency, long-term care, foster care, and adolescents.

Division of Child Mental Health Services

The Division of Child Mental Health Services ("CMH") provides voluntary mental health and substance abuse treatment services to children less than 18 years of age. These services are available to those without health insurance as well as to those children who have Medicaid but who need more than 30 units of outpatient counseling services per year. The Director of CMH is Susan Cycyk.

Approximately 20% of the children in DFS custody receive services from CMH. CMH manages these services by licensed mental health professionals who coordinate and contract with community providers. CMH also operates several residential treatment centers within the State. On April 30, 2007, CMH was serving 1,432 children.

Division of Youth Rehabilitative Services

The Division of Youth Rehabilitative Services (“YRS”) provides services to youth who have been adjudicated delinquent by the Family Court and ordered by the court system to receive rehabilitative services.

These services range from secure care to community services. YRS operates 5 secure care facilities in Delaware. The Director of YRS is Perry Phelps. On April 30, 2007, YRS was serving 2,884 youth, 12% of which were in the legal custody of DFS.

To learn more about the Children’s Department, please visit their website at <http://kids.delaware.gov>.

In New Castle County, Judges Chapman, Coonin, Crowell and Hitch are assigned to the Court’s at-risk unit and alternate weeks in which they handle DFS matters and criminal matters. Initial hearings (preliminary protective hearings) in New Castle are typically held every Wednesday.

In Kent and Sussex Counties, the Judges are responsible for all Family Court matters. Typically, each Judge reserves one day per week on his or her calendar to handle DFS matters.

To learn more about the Family Court and/or to access Court forms, please visit its website at <http://courts.delaware.gov/Courts/Family%20Court/>.

B. THE FAMILY COURT

The Delaware Family Court is now a constitutional court that has original exclusive jurisdiction over abused, neglected, and dependent children. 10 Del. C. § 921. The Court's criminal and civil jurisdiction is set forth in 10 Del. C. §§921 and 922. A Family Court phone listing is attached at Tab 2.

The Family Court assigns one judge to a case from the day a child enters foster care. That judge remains with the case until permanency is achieved, either by reunification with the family, termination of parental rights and adoption, or some other permanent plan. There are currently four judges in New Castle County, three judges in Kent County, and three judges in Sussex County that handle these cases.

C. THE DEPARTMENT OF JUSTICE

The Delaware Department of Justice (“DOJ”) has both criminal and civil divisions. The Deputy Attorneys General (“DAG”) in the civil division provides legal representation to most state agencies. The Department of Justice has recently created a Family Services Division which will house both civil and criminal matters that affect families. This will include the Deputies who represent DFS. Currently, there are nine deputies statewide who represent the Division of Family Services (4-New Castle, 2-Kent, 2-Sussex). In addition, there is one deputy assigned as General Counsel to DSCYF. However, one of the New Castle Deputies, Patricia Dailey Lewis, Esquire, has been chosen to lead the Family Services Division. As such, the leadership

and staffing structure may change during 2007-2008. Regardless, DFS is represented by a DAG in every court proceeding. Where CMH and/or YRS are also involved with a child in legal custody, the DAG is responsible for representing all three Divisions in Court. A current listing of DFS deputies and their phone numbers is attached at Tab 3.

D. COURT APPOINTED SPECIAL ADVOCATE PROGRAM (“CASA”)

The CASA program was created by statute in 1981. It is managed by the Family Court and is comprised of citizen volunteers who have agreed to represent the best interests of abused, neglected, and dependent children in child welfare proceedings. It is governed by 31 Del. C., Ch. 36. The CASA program has a statewide program director as well as nine CASA coordinators.

The coordinators provide oversight, guidance, and training to the citizen volunteers. In addition, for any court proceeding wherein the CASA must appear, the CASA is represented by a contracted attorney. Currently, there are four contracted attorneys statewide that represent the CASA program. The current coordinators and attorneys are included with this package under Tab 2.

Because CASA and OCA serve the same role in Family Court proceedings, it is rare that both will be in the same case. However, this circumstance most often exists when a teenager in foster care gives birth to a child whom he or she is unable

to care for. If one agency is representing the teenage parent, the other agency will represent the child since oftentimes what is best for the teenage parent is not what is best for the newborn.

E. OFFICE OF THE CHILD ADVOCATE

The Office of the Child Advocate (“OCA”) was created in 1999. In the wake of the numerous child abuse deaths in Delaware, the OCA was designed to safeguard the welfare of Delaware's children. In addition to policy reform, legislative advocacy, and training, OCA was charged with securing legal representation for children's best interests in child welfare proceedings. In that regard, the attorney serving as a GAL would have the same duties and responsibilities as the CASA program. However, the attorney would fill the role of CASA, CASA coordinator and CASA attorney. The program was designed to complement the CASA program since not enough citizen volunteers are available to represent the 1,160 children in Delaware's foster care system. A phone directory of OCA is included at Tab 4. The OCA statute is located at Tab 17.

F. THE PARENT'S ATTORNEY

Currently, there is no absolute constitutional mechanism in place to ensure that parents have legal representation from the day their children are removed from their custody. The United States Supreme Court has held that there is no absolute constitutional right to representation in termination of parental rights proceedings. *Lassiter v. Dept. of Social Svcs.*, 452 U.S. 18 (1981). The Delaware Supreme Court has followed that holding in *Matter of Carolyn S.S.*, Del. Supr., 498 A.2d 1095 (1984) and extended that holding to all dependency/neglect proceedings involving DFS in *Watson v. DFS*, No. 18, 2002 (Del. 2002). However, the Delaware Supreme Court has been clear that in applying *Lassiter*, most indigent parents will be entitled to counsel. Furthermore, the new Family Court Rules require the appointment of counsel for indigent parents in matters where DFS is a party. See Family Court Civil Rules 206 and 207. As a practical matter, all indigent parents involved in proceedings where DFS is a party receive court-appointed counsel. Currently, 8 attorneys are contracted statewide – 4 in New Castle, 2 in Kent and 2 in Sussex.

In February of 2006, the Delaware Supreme Court decided *Walker v. Walker*, Del. Supr., 892 A.2d 1053 (2006). In *Walker*, the Court determined that the balancing test for entitlement to representation by parents in termination of parental rights cases where the State was involved extended also to parents in private termination of parental rights proceedings. The case further inferred, through Footnote 5, that those rights by parents may further extend to private dependency/neglect proceedings. *Id.*

CHAPTER THREE - HOW THE DIVISION OF FAMILY SERVICES PROCESSES A CASE

DFS utilizes a computerized case management system known as FACTS – the Family and Children Tracking System. All facts of the case are entered into this system. The cases are located by parents(s) name. Any cases which existed prior to 1996 will likely also have hard paper files at the agency. In addition, some hardcopy data, such as that obtained from outside sources, is still maintained on most cases.

When a referral alleging abuse, neglect and/or dependency is received by the Division of Family Services (“DFS”), it is received by the DFS hotline. The hotline phone number is 1-800-292-9582. If the referral is accepted, DFS generates a form in FACTS titled: “Hotline Family Abuse Report”. If the referral is made after-hours, a **hotline investigator** will do the initial contacts and transfer the case to an investigation worker once regular business hours resume. If emergency custody of a child is required after-hours, DFS will contact the on-call Family Court judge for *ex parte* custody.

A dependency/neglect petition for custody is required to be filed for after-hours cases by 12 noon the next business day in Family Court. See form at Tab 5. If emergency custody is required during regular business hours, DFS will file the emergency petition and wait for notice from the Family Court that the request has been approved or denied.

An **investigation worker** is immediately assigned to determine whether or not the allegations in the referral can be substantiated. The investigation worker

must complete his or her investigation within 45 days. Upon completion of the investigation, the worker generates a report titled “Risk Assessment” which outlines the risk factors and an analysis of the allegations. A second report titled “Assessment Supervisor Risk Disposition” is generated by the supervisor and acknowledges a review of the initial report and approval of its findings. If the allegations prove to be unfounded, DFS may choose either to close the case or refer the family for services.

Once a substantiated investigation is completed, the case is usually transferred to a **treatment worker**. A treatment worker is responsible for providing reunification services to the family as well as any special services for the child. The services for the family are outlined in a **case plan or family service plan**. See Tab 6 for an example. The services for the child are outlined in a **Plan for Child in Care** (PCIC, parts II – IV). See Tab 7 for examples. Usually, the child is placed in a DFS foster home or with suitable family members. However, sometimes, the child is placed in a foster home or group home/shelter contracted by DFS with a private agency. Depending on what services DFS purchases in each case, those agencies may prepare the PCICs and/or the family case plans. In short, a family may have a worker through the private agency, an investigation worker and a treatment worker. In addition, the foster home (if through DFS) will have a **foster home coordinator** who manages the needs of the foster families. Information on foster care resources may be found at Tab 22.

While the case is assigned to a treatment worker with a goal of reunification, the worker is obligated to coordinate services

for the family and the child. These services may include substance abuse treatment, domestic violence counseling, mental health treatment, parenting classes, parent aides, anger management, individual therapy, family therapy, employment, housing, protective daycare and visitation with parents and siblings. Services for the child may include medical care, dental care, mental health treatment/counseling, educational services, recreational activities, etc. Information on educational services can be found at Tabs 23 and 24. It is important that the AGAL has input into the service plans as well as independently monitors the services for compliance, progress and behavioral changes.

If the plan for a child is changed from reunification to termination of parental rights or a similar permanent plan (including long term foster care), the case is transferred to a **permanency worker** or a **long-term care worker**. That worker is charged with providing the child with the services he/she needs, and for locating and recruiting adoptive homes. Once the Court approves that plan change, DFS is no longer obligated to provide reunification services to the family. *In re Burns, Del. Supr., A.2d (1986)*. Once the child is placed in a permanent home, the worker must ensure the necessary adoptive home studies, subsidies and support services are in place for the pre-adoptive family. The worker also monitors the status of any petitions filed with the Family Court.

For children who have a plan of another permanent planned living arrangement (“APPLA”), and are at least age 16, they should also receive provisions of independent livings services which are designed to help them lead productive,

successful lives as they age out of the foster care system. Together with the DFS long-term care worker, each child eligible for independent living services should have a worker assigned to provide same through one of DFS’ contacted agencies. This worker and agency is an important contact and resource to ensure that children are getting daily living skills, employment skills and opportunities, access to education and training, family planning and pregnancy prevention, etc. There are 2 contracted agencies in New Castle County, and 1 in each of the lower two counties.

CHAPTER FOUR – HOW A CASE MOVES THROUGH THE JUDICIAL PROCESS

As stated above, if DFS obtains custody of a child at a time other than business hours, *ex parte* custody is granted by an on-call judicial officer. A petition reflecting the allegations must be filed with the Family Court by 12 noon the next business day. If custody is requested during regular business hours, the Court may enter an *ex parte* order if requested, or it may deny the *ex parte* and schedule the case for a preliminary protective hearing (formerly known as a probable cause hearing). The applicable Family Court Rules are located at Tab 18.

Preliminary Protective Hearing

The first hearing on the petition before the Family Court is known as a Preliminary Protective Hearing. *See Family Court Civil Rule 212*. A Preliminary Protective Hearing (“PPH”) must be held within ten days of the dependency/neglect petition being filed. At that hearing, the petitioner (usually DFS) must establish that probable cause exists to believe that a child continues to be in actual physical, mental or emotional danger or there is a substantial imminent risk thereof OR that the child is abused, neglected or dependent. Hearsay evidence is admissible.

If the Court determines that custody of the child continues with DFS, the Court will provide the preliminary protective hearing order to the parties with notice of the date and time for the Adjudicatory Hearing. The Court may also order that certain services be put in place for the family, order that the parents complete certain tasks before the next hearing, order

paternity testing, require visitation with parents and/or siblings, and/or ask for a prompt exploration of relatives. Where an alleged father has been identified, paternity testing should be routinely requested.

Adjudicatory Hearing

An Adjudicatory Hearing must be scheduled within 30 days of the Preliminary Protective Hearing. Family Court Civil Rule 213 governs this procedure. DFS must show by a preponderance of the evidence that a child is dependent, neglected or abused as those terms are defined in 10 *Del. C.* § 901, and that it is in the child’s best interests for custody to be with DFS. The definitions are included at Tab 25. Hearsay evidence is not admissible.

Again, the Court may order the parties to do a variety of tasks and/or engage in services. Visitation between the child and his or her family will also be addressed.

Dispositional Hearing

The next Court review is a Dispositional Hearing. *See Rule 214*. At this hearing, the Court determines if the appropriate services for the family have been implemented and/or approves the case plan for the family and for the child. This hearing must take place within 20 days of the Adjudicatory Hearing; however, in some instances it may be combined with the Adjudicatory Hearing if all parties have developed and agreed on an appropriate case plan and goal. The minimal requirements for a case plan are found at *Family Court Civil Rule 220*. Should DFS not be agreeable to an attorney’s involvement and/or assistance in developing the case plan, issues of

disagreement should be handled at the Dispositional Hearing.

Review Hearings

Review hearings usually take place every 3 months. At the review, the assigned Judge will inquire of all parties whether progress is being made on the case plan(s) and/or what is preventing progress on same. The Judge will also want to hear how the child is doing, and what services are being provided to meet the child's needs.

Internal DFS Permanency Committee

Once a child has been in care for nine months, DFS policy requires that the child's permanent plan be reviewed (if it has not been reviewed earlier). A committee comprised of DSCYF administrators and supervisors reviews each case. A DFS Deputy Attorney General should be present for all reviews. Input is received from CASAs or Attorney GALs regarding recommendations for the child; however, DFS does not permit anyone to attend the entire committee meeting. At the conclusion of the meeting, the committee decides what the permanent plan for the child should be. If the permanent plan is changed from reunification, DFS must then seek court approval. See "Permanency Hearing".

Child Placement Review Board

The Child Placement Review Board (formerly the Foster Care Review Board) is controlled by 31 Del. C., Ch.38. The Board was created to be an independent monitor of the child welfare system with the task of reviewing child placements to ensure the best interests of children are being met. The Board reviews every child

in care at 9 months, and then every year thereafter. The GALs, the parents, the foster parents, and the DFS workers should appear at the Board reviews. The Board should send its findings and recommendations to the parties. The parties then have 30 days to submit objections to the findings before the recommendations are submitted to the Family Court.

Permanency Hearing

Once a child has been in the custody of DFS for a period of 12 months, the Family Court must hold a permanency hearing to determine what the goal for the child should be. *See Rule 216*. Any party, or the Court *sua sponte*, can request a change of goal any time after a child enters care. Only DFS can file for an actual permanency hearing. This becomes most important with cases where TPR grounds exist upon entry into care and/or where DFS does not have to provide reunification services to the family.

If termination of parental rights is determined to be the goal, a petition must be filed with the Family Court within 15 months of the day the child entered care.

Termination of Parental Rights

If termination of parental rights is the chosen goal for a child, DFS must prove by clear and convincing evidence one of the enumerated grounds set forth in 13 Del. C. § 1103. DFS must also prove by clear and convincing evidence that termination is in the child's best interests. A copy of the TPR statutory grounds is included at Tab 20. An example of an Answer to a TPR petition as well as a blank voluntary consent form are located at Tab 8.

Adoption

Once a TPR has been granted, and all appeals have been exhausted without success, an adoption petition may be filed. Many times children are adopted by their foster parents(s). In such cases, an adoptive home study of the foster parent(s) is usually completed by an outside agency. This process can take up to six (6) months; however, it can begin long before a TPR petition is even filed thereby shortening the timeframe for permanency. Once the home study is completed, DFS presents home studies for the children to their Permanency Committee for approval. See Tab 26 for the OCA home study tool to help compare possible family resources for a child. After a family is approved for adoption, subsidy paperwork and the legal petition is prepared. The petition is filed with Family Court, and is usually assigned to the Judge who granted the TPR. If the adoptive parents so desire, an adoption hearing will be scheduled. An example of an Answer to an Adoption Petition as well as a sample Open Adoption agreement are located at Tab 9.

Other Court Proceedings

Visitation: At any time during a case, a petition for visitation may be filed by a parent or relative. 13 Del. C. § 728 governs visitation. In short, a parent is entitled to visit with their child unless the Court determines that visitation would endanger the child's physical health or significantly impair his or her emotional development.

Guardianship and Permanent Guardianship: 13 Del. C., Ch. 23 addresses guardianship and permanent guardianship. See Tab 21. Guardianship is a temporary arrangement for a child

wherein the guardian is custodian of the child, but also may makes decisions regarding medical, education, etc. However, a parent can always come back and petition for return of the child. Despite this, the Delaware Supreme Court has determined that regular guardianship constitutes permanency for a child. *CASA v. DSCYF*, et al., No. 59, 2003 (Del. 2003).

Permanent guardianship allows a guardian to permanently raise a child without the ability of the parent to petition for return of the child. Permanent guardianship also provides for visitation and/or contact with the biological parent as long as that contact is in the child's best interests. Federal subsidies are no longer available in Delaware for guardianships or permanent guardianships, and therefore guardianships and permanent guardianships are rarely subsidized by DFS.

Relative Custody: If a relative files for custody of a child in DFS care, and the parent is still not able to care for the child, the relative must show that it is in the best interest of the child to be in their custody instead of DFS'. The Court is discouraging the filing of these custody petitions and is instead asking relatives to file for guardianship.

Motions to Rescind Custody: When DFS believes that one or both parents are now able to provide adequate care for their child or children, they typically file a motion to rescind custody. If no one objects to the motion, the Court may simply sign the order without a hearing. All parties, including the GAL, should be noticed on the motion.

CHAPTER FIVE – DUTIES OF THE ATTORNEY GUARDIAN AD LITEM

As an attorney GAL, you are charged with representing the best interests of the child in any child welfare proceeding. 29 Del. C., § 9007A(c) sets out the GAL's statutory duties. In addition, 13 Del. C. § 722(a) sets forth the factors which the Court considers in making a best interests determination. A copy of the best interests statute is located at Tab 19. Any recommendations to the Court should specifically include factual evidence detailing:

1. The wishes of the parents;
2. The wishes of the child;
3. The interactions and relationships between the child and his parents, grandparents, siblings, significant others, foster parents;
4. The child's adjustment to his or her home, school and community;
5. The mental and physical health of all individuals involved;
6. Past and present compliance by both parents with their rights and responsibilities to their child under 13 Del. C. § 701. Parental responsibilities is also defined at 13 Del. C. § 1101(10);
7. Evidence of domestic violence as provided for in 13 Del. C., Ch. 7A; and
8. The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

Who do I interview? What records do I review?

In order to gather the necessary evidence to answer the above questions, a GAL should begin by interviewing the child. Several publications on interviewing children are available. The *Handbook on Questioning Children* by Anne Graffam Walker is most helpful. For ethical issues regarding a GAL's relationship with the child, please see Chapter 5. Also, if criminal charges are pending where the child is the victim, the GAL should refrain from interviewing the child regarding those circumstances and instead should request a forensic interview be completed by the Children's Advocacy Center ("CAC"). See the CAC website at <http://www.cacofde.org> for more information.

The GAL should also interview the biological parents, the foster parents, school teachers, daycare providers, relatives, counselors, and pediatricians. The GAL should interview the DFS social worker and other professionals involved with the child. Each one of these contacts may lead to further contacts such as friends, pastors, prior foster parents, an educational surrogate parent or distant relatives. In addition, the home where the child resides, the home where the child previously resided, the school and the daycare should be visited. Observations of visits between the child and his or her biological parents should be made.

The GAL should review the DFS file and continue to do so on a regular basis. The OCA will initially obtain the DFS file for you. However, you should then obtain regular updates from DFS as well as any other service providers. You also should obtain the child's pediatric records and

birth records, if relevant. (One reason they may be relevant is to determine if the child was born cocaine or opiate positive). You should also obtain the child's school records and make regular contact with school personnel. All of these records may be obtained by simply sending a letter to the provider with a copy of the Court Order of Appointment. A sample letter is located at Tab 16. Drug and alcohol providers will likely also require a consent signed by the parents or a specific court order regarding those records which meet the requirements of 42 USC § 290DD-2 and 42 CFR §§2.61-2.64. Copies of several releases from local drug, alcohol and mental health providers are located at Tab 10. A sample motion for release of these records is located at Tab 11.

While you are not responsible for coordinating services for the parents, to the extent that the prompt involvement in services will benefit your child, you should have input. For example, if there are allegations of domestic violence, it benefits your client for the parents to promptly engage in anger management and/or domestic violence counseling.

A relationship should be established with the child. No matter how young a child is, if time is spent with the child, the child will likely be able to communicate his or her wishes to the GAL. *The Child's Attorney* by Ann Haralambie is an excellent resource for determining what steps to take in making a best interests determination, although § 722 does set out a general framework of inquiry.

At Tab 13 is a checklist which sets out what inquiries, interviews, and records you should be obtaining during your representation. Sample letters for record requests can be found at Tab 16. It is your

obligation, on behalf of the child, to take a proactive approach in these matters, and to ensure that the Court is getting the information it needs to make a decision which is truly in the best interest of the child.

Once the GAL has gathered the necessary evidence, the GAL is in a position to make recommendations to the Court, and should do so at every Court proceeding. How this is done given the inherent conflicts between attorney and GAL roles, is discussed in the next chapter.

In addition, the GAL should be advocating for whatever this child needs, whether it be counseling, visitation with siblings, after school activities, new shoes, etc. The GAL must also be keenly aware of any changes in placement, and must take an active role to ensure that changes in school, living arrangements, daycare or visitation is in the child's best interests. Family Court Rules 211(b) requires DFS to provide reasonable notice of any changes in placement as does 29 Del. C. § 9007A(c)(9). The GAL should be included in decisions regarding same, and should take whatever action is necessary to protect the best interests of that child. Remember, you are this child's voice. Without you, unilateral decisions will be made about this child that may or may not be best for him or her.

What if the child's expressed wishes differ from what the GAL believes is in the child's best interests?

Under the statute, 9007A(c)(14) requires the GAL to not only make the child's wishes known to the Court, but also to alert the Court if the child's expressed wishes differ from the GAL's position on best interests.

Depending on the age of the child, the Court may appoint an attorney to represent the child's expressed wishes. This decision is largely governed by the Supreme Court decision of *In re Samantha Frazer*, Del. Supr., 721 A.2d 920 (1998).

If your ultimate recommendations to the Court will be different than the expressed wishes of the child, you have an obligation to alert the Court of the conflict. The Court will then make a determination as to what your proper role will be, and whether additional representation is necessary. If this situation occurs, please contact OCA to discuss it prior to requesting the Court to appoint an additional attorney for the child.

PLEASE REMEMBER TO KEEP TRACK OF THE TIME YOU SPEND ON EACH CASE AND PERIODICALLY FORWARD IT TO OCA SO THAT WE CAN ACCURATELY DOCUMENT THE PRO BONO EFFORTS OF OUR ATTORNEYS. ALSO, PLEASE REMEMBER TO NOTIFY US UPON CONCLUSION OF YOUR CASE SO THAT WE MAY UPDATE OUR RECORDS.

CHAPTER SIX – ETHICAL DILEMMAS FACED BY AN ATTORNEY GUARDIAN AD LITEM

Several conflicts exist between the Rules of Professional Conduct and an attorney guardian *ad litem*'s role in representing the best interests of a child. There are three primary areas of conflict. The first pertains to an attorney acting as both an advocate and a witness. The second involves the confidentiality of communications between the child and the attorney. The third involves the duty to abide by a client's decisions versus representing the best interests of the child.

As of June 10, 2002, the statutory duties of an attorney guardian ad litem have been further clarified as a result of a year long effort between OCA and the Office of Disciplinary Counsel.

29 Del. C. § 9007A(c) now begins with the following: "The attorney GAL's duty is to the child. The scope of the representation is the child's best interests. The attorney guardian ad litem shall have the duty of confidentiality to the child unless disclosure is necessary to protect the child's best interests."

What the first two sentences mean is that the child is your client. However, your scope of representation of that child is the child's best interests. **Rule 1.2** addresses scope of representation. When you initially get a case, you need to make sure you explain that to your child in terms the child can understand. Make sure to explain that while the scope includes the wishes of the child, there are also many other things you must consider. See 13 Del.C. § 722 for guidance. And always remember, if your recommendations to the Court on the child's best interests and the

child's expressed wishes conflict, please call OCA immediately so we can decide how best to proceed.

The third sentence indicates that you and your child client have confidentiality unless disclosure is necessary to protect the child's best interests. **Rule 1.6** supports this by allowing disclosure "to comply with other law or court order." OCA is also mentioned in the comments following Rule 1.6. This is not to say, however, that you should routinely violate your client's confidentiality. This disclosure piece should be used in rare circumstances primarily where there is no other way to protect your client's safety.

The OCA statute also clarifies that you are not a witness in the case, and that you should NOT take the stand nor file a report with the Court. **Delaware Rule of Professional Conduct 3.7** prohibits an attorney from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. § 9007A(c)(4) states that the attorney GAL should "present evidence to the Court in support of his or her position", eliminating any reference to an oral or written report. In participating in Court hearings regarding your client, you should be prepared to call witnesses, cross-examine witnesses and introduce evidence. In closing argument, you can then make a best interests recommendation based on the evidence presented to the Court.